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IN THE

Supreme Court of the United States

October Term, [redacted] 1963

No. [redacted] 39

THE NEW YORK TIMES COMPANY,
A Corporation,

Petitioner,

v.

L. B. SULLIVAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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INDEX

	PAGE
OPINIONS BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
STATEMENT	3
1. The nature and circumstances of the alleged libel	3
2. The evidence of allegedly libelous impact upon respondent	6
3. The demand for a retraction	8
4. The rulings below on the merits	8
5. The jurisdiction of the Circuit Court	9
REASONS FOR GRANTING THE WRIT	12
CONCLUSION	31
APPENDIX A	33
APPENDIX B	37
APPENDIX C	105

CITATIONS

CASES:

Abrams v. *United States*, 250 U. S. 616	13
Age-Herald Publishing Co. v. *Huddleston*, 207 Ala. 40	28
Barrows v. *Jackson*, 346 U. S. 249	21
Bates v. *City of Little Rock*, 361 U. S. 516	20
Beauharnais v. *Illinois*, 343 U. S. 250	15
Blankenship v. *Blankenship*, 263 Ala. 297	23
Bridges v. *California*, 314 U. S. 252	14, 18
Canadian Pacific Ry. Co. v. *Sullivan*, 126 F. 2d 433 (1st Cir.) cert. den. 316 U. S. 696	24
Cantwell v. *Connecticut*, 310 U. S. 296	12, 14, 20

PAGE

Chaplinsky v. *New Hampshire*, 315 U. S. 568 15
Craig v. *Harney*, 331 U. S. 367 ..... 14, 18
Ex Parte Cullinan, 224 Ala. 263 22
Dailey Motor Co. v. *Reaves*, 184 N. C. 260 23
Davis v. *Farmers Co-operative Co.*, 262 U. S. 312 24
Davis v. *O'Hara*, 266 U. S. 314 23
Davis v. *Wechsler*, 263 U. S. 22 23
Dean Milk v. *City of Madison*, 340 U. S. 349 15
De Jonge v. *Oregon*, 299 U. S. 353 13
Denver & R. G. W. R. Co. v. *Terte*, 284 U. S. 284 ..... 24, 30
Edwards v. *California*, 314 U. S. 160 29
Erlanger Mills, Inc. v. *Cohoes Fibre Mills, Inc.*, 239 F. 2d 502 (4th Cir.) 30
Fisher's Blend Station v. *Tax Commission*, 297 U. S. 650 30
Garner v. *Louisiana*, 368 U. S. 157 18
Grosjean v. *American Press Co.*, 297 U. S. 233 20
Ex Parte Haisten, 227 Ala. 183 22
Hanson v. *Denckla*, 357 U. S. 235 ..... 24, 25, 26, 27, 28
Harrub v. *Hy-Trous Corporation*, 249 Ala. 414 22
Hartman v. *Time, Inc.*, 166 F. 2d 127 (3d Cir.) cert. den. 338 U. S. 858 26
Hutchinson v. *Chase & Gilbert*, 45 F. 2d 139 27
Insull v. *New York World Tel. Corp.*, 273 F. 2d 166, (7th Cir.) cert. denied 362 U. S. 942 26
International Shoe Co. v. *Washington*, 236 U. S. 310 ..... 24, 25, 26, 27
Kilpatrick v. *Texas & P. Ry. Co.*, 166 F. 2d 788 (2d Cir.) 29
Kingsley Pictures Corp. v. *Regents*, 360 U. S. 684 18
Konigsberg v. *State Bar of California*, 366 U. S. 36 ..... 14, 16
Mattox v. *News Syndicate Co.*, 176 F. 2d 897 (2d Cir.) cert. den. 334 U. S. 838 26

PAGE

McGee v. *International Life Ins. Co.*, 355 U. S. 220 ... 27

Michigan Central Railroad Company v. *Mix*, 278 U. S. 492 ... 24, 30

Morgan, Connor and Waggoner v. *Columbia Broadcasting System, Inc.*, U. S. D. C. N. D. Ala. (So. Div.) Civil Actions No. 10067-S, 10068-S, 10069-S ... 19

N. A. A. C. P. v. *Alabama*, 357 U. S. 449 ... 20, 21, 22, 23

Near v. *Minnesota*, 283 U. S. 697 ... 15

New York Times Company v. *Connor*, 291 F. 2d 492 ... 19

Norris v. *Alabama*, 294 U. S. 587 ... 18

Olcese v. *Justice's Court*, 156 Cal. 82 ... 23

Orange Crush Grapico Bottling Co. v. *Seven-Up Company*, 128 F. Supp. 174 (N. D. Ala.) ... 22

Parks and Patterson v. *New York Times Company*, 195 F. Supp. 919, rev'd. September 18, 1962 ... 19

Pennekamp v. *Florida*, 328 U. S. 331 ... 14, 18

Perkins v. *Benguet Consol. Mining Co.*, 342 U. S. 437 ... 25

Polizzi v. *Cowles Magazines, Inc.* 345 U. S. 663 ... 28

Putnam v. *Triangle Publications, Inc.* 245 N. C. 432 ... 30

Roberts v. *Superior Court*, 30 Cal. App. 714 ... 23

Roth v. *United States*, 354 U. S. 476 ... 15

St. Mary's Oil Engine Co. v. *Jackson Ice & Fuel Co.*, 224 Ala. 152 ... 22

Shelley v. *Kraemer*, 334 U. S. 1 ... 21

Shelton v. *Tucker*, 364 U. S. 479 ... 15, 20

Smith v. *California*, 361 U. S. 147 ... 15, 20, 30

Speiser v. *Randall*, 357 U. S. 513 ... 20

Staub v. *City of Baxley*, 355 U. S. 313 ... 23

Sweeney v. *Patterson*, 128 F. 2d 457 (D. C. Cir. 1942) cert. denied, 317 U. S. 678 (1942) ... 15

Sweeney v. *Schenectady Union Publishing Co.*, 122 F. 2d 288 ... 16

PAGE

Thompson v. *Louisville*, 362 U. S. 199 18

Thompson v. *Wilson*, 224 Ala. 299 23

Times Film Corporation v. *City of Chicago*, 365 U. S. 43 ..... 14, 15

Travelers Health Assn. v. *Virginia*, 339 U. S. 643 27

Ward v. *Love County*, 253 U. S. 17 23

Whitney v. *California*, 274 U. S. 357 19

Willis and Penton v. *Columbia Broadcasting System, Inc.*, U. S. D. C. M. D. Ala. (No Div.) Civil Actions No. 1790-N, 1791-N 19

Wood v. *Georgia*, 370 U. S. 375 ..... 14, 18

Zuber v. *Pennsylvania R. Co.*, 82 F. Supp. 670 (N. D. Ga.) 24

STATUTES:

Act of July 14, 1798, 1 Stat. 596 13

Title 28 U. S. C. § 1257(3) 1

Title 7 Section 199(1) Code of Alabama (1940) 3

Miscellaneous

25 ALR 2d 838 23

Chafee, *Free Speech in the United States* (1941), pp. 27-29 13

Leflar, *The Single Publication Rule*, 25 Rocky Mt. L. Rev. 263 (1953) 26

Prosser, *Interstate Publication*, 51 Mich. L. Rev. 959 (1953) 26

29 Univ. of Chi. L. Rev. 569 (1962) 26

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Alabama entered in the above-entitled case on August 30, 1962.

Opinions Below

The opinion of the Supreme Court of Alabama (Appendix B, *infra*, pp. 37-78) is reported in 144 So. 2d 25. The opinion of the Circuit Court, Montgomery County, denying petitioner's motion to quash service of process (Appendix B, *infra*, pp. 80-89) is unreported. The charge to the jury of the Circuit Court (Appendix B, *infra*, pp. 89-104) appears at R. 1947-1954, 1957A-1957J.

Jurisdiction

The judgment of the Supreme Court of Alabama (Appendix B, *infra*, pp. 78, 79) was entered on August 30, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

Questions Presented

1. Whether, consistently with the guarantee of freedom of the press in the First Amendment as embodied in the Fourteenth, a state may hold libelous *per se* and actionable by an elected City Commissioner, without proof of special damage, statements critical of the conduct of a department of the City Government under his jurisdiction which are inaccurate in some particulars.

2. Whether there was sufficient evidence to justify, consistently with the guarantee of freedom of the press, the determination that statements, naming no individual but critical of the Police Department under the jurisdiction of the respondent as an elected City Commissioner, were defamatory as to him and punishable as libelous *per se*.

3. Whether an award of $500,000 as "presumed" and punitive damages for libel constituted, in the circumstances of this case, an abridgement of the freedom of the press.

4. Whether the assumption of jurisdiction in a libel action against a foreign corporation publishing a newspaper in another state, based upon sporadic newsgathering activities by correspondents, occasional solicitation of advertising and minuscule distribution of the newspaper within the forum state, transcended the territorial limitations of due process, imposed a forbidden burden on interstate commerce or abridged the freedom of the press.

Constitutional and Statutory Provisions Involved

The constitutional and statutory provisions involved are set forth in Appendix A, *infra*, pp. 33-36.

Statement

The judgment of the Supreme Court of Alabama in this cause affirmed a judgment of the Circuit Court of Montgomery County, entered on the verdict of a jury, against the petitioner and four co-defendants, Ralph D. Abernathy, Fred L. Shuttlesworth, S. S. Seay, Sr., and J. E. Lowery, awarding respondent $500,000, the full amount claimed as damages for libel (R. 1958). Respondent, one of three elected Commissioners of the City of Montgomery, Alabama, instituted the action on April 19, 1960, alleging that he had been libeled by two paragraphs of an advertisement published in *The New York Times* on March 29, 1960. Service of process was made on petitioner by delivery to an alleged agent in Alabama and by substituted service pursuant to the "long-arm" statute of the State (Title 7, Section 199 (1), Code of Alabama, Appendix A, *infra*, p. 34). A motion to quash asserting constitutional objections to the jurisdiction of the Circuit Court under the due process clause of the Fourteenth Amendment and the Commerce Clause (R. 33, 39, 350) was denied (R. 47). In the ensuing trial, petitioner contended by demurrer (R. 58-9), objection to instructions to the jury (R. 1951-2), request for a directed verdict (R. 1957M) and motion for a new trial (R. 2011) that the publication could not be held to libel the respondent without abridging the freedom of the press guaranteed by the First and Fourteenth Amendments. The contention was rejected by the Circuit Court. The Supreme Court of Alabama sustained these rulings on appeal.

1. **The nature and circumstances of the alleged libel.**—The advertisement (R. 1698-1702), a copy of which was attached to the complaint (R. 2-10) and is set forth below in Appendix C, *infra*, p. 105, was placed through a New York advertising agency by an organization named the "Com-

mittee to Defend Martin Luther King and the Struggle for Freedom in the South." It named approximately 80 individuals as officers and members of the Committee, including many of national and world fame for humanitarian work and for achievement in religion, political affairs, trade unions and the arts. Under the title "Heed Their Rising Voices", taken from a *New York Times* editorial of March 19, 1960, the advertisement portrayed the activities and struggles of students and others engaged in nonviolent demonstrations against the practices of racial segregation. As indicated by the Committee's title, the advertisement centered mainly on the problems of Dr. Martin Luther King, Jr., founder and president of the Southern Christian Leadership Conference, and concluded with an appeal for funds to support the legal defense of Dr. King, who had been indicted shortly before for perjury.*

Of the advertisement's ten paragraphs of text, the third and part of the sixth were the basis of respondent's libel claim. The first paragraph of the advertisement, not complained of by respondent, described generally the actions and goals of Southern Negro students demonstrating "in positive affirmation of the right to live in human dignity as guaranteed by the U. S. Constitution and the Bill of Rights." It went on to charge that these students were "being met by an unprecedented wave of terror . . . ."

The second paragraph told of a student effort in Orangeburg, South Carolina, to obtain lunch-counter service, and reported that the students had been forcibly ejected, tear-gassed and arrested en masse under physically trying conditions.

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* Dr. King was later acquitted on this charge (R. 1803).

The third paragraph, the first of the two alleged to have libeled respondent, read as follows:

> "In Montgomery, Alabama, after students sang 'My Country, 'Tis of Thee' on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shot-guns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission."

Respondent's evidence showed that the only part of this statement thought to refer to him was the assertion that "truckloads of police" had "ringed" the campus (R. 1837), and that this assertion was incorrect "although on three occasions they [the police] were deployed near the campus in large numbers" (R. 1712). It also appeared that less than the "entire student body" protested and that the dining hall was not "padlocked", but, as respondent testified, these were matters relating in any event to the State Education Department, not to him (R. 1840-41).

The fourth and fifth paragraphs of the advertisement, not claimed to be false or libelous in any respect, spoke of student activity in "Tallahassee, Atlanta, Nashville, Savannah, Greensboro, Memphis, Richmond, Charlotte, and a host of other cities in the South"; charged hostility by police and other officials; and went on to portray the leadership role of Dr. King.

The sixth paragraph began with the following sentences, comprising the second extract charged to be libelous and the remainder of the basis for the lower court's characterization of the advertisement as "false and malicious" (Appendix B, *infra*, p. 77):

> "Again and again the Southern violators have answered Dr. King's peaceful protests with intimida-

tion and violence. They have bombed his home, almost killing his wife and child. They have assaulted his person. They have arrested him seven times—for 'speeding,' 'loitering' and similar 'offenses.' And now they have charged him with 'perjury'—a *felony* under which they could imprison him for *ten* years."

As to this paragraph, respondent's evidence showed:

(1) That Dr. King's home had in fact been bombed twice, although one of the bombs failed to explode, with Dr. King's wife and child at home, and that both occasions preceded respondent's tenure as Commissioner (R. 1713, 1808, 1811).

(2) That Dr. King had been arrested only four times, not seven as the advertisement said, three of the arrests antedating respondent's tenure as Commissioner (R. 1711, 1713, 1827).

(3) That Dr. King had in fact been indicted on two perjury counts, carrying potential sentences of five years each (R. 1713).

(4) That there was a dispute as to whether Dr. King had been assaulted on the occasion of an arrest, but this occasion had occurred, in any event, long before respondent became a Commissioner (R. 1713, 1816, 1817).

The remainder of the advertisement, praising Dr. King's efforts and urging financial support for his defense, was not claimed to be false or libelous.

2. **The evidence of allegedly libelous impact upon respondent.**—The condemned advertisement contained no mention of respondent, or of the Montgomery Commissioners, or any of them. As stated in respondent's testimony, the basis for his role as aggrieved plaintiff was the "feeling" that the advertisement reflected upon him, "the other Commissioners and the community" (R. 1849).

Specifically, the evidence showed that respondent, in his capacity as Commissioner, had supervision over the Montgomery Police Department, Fire Department, Department of Cemetery and Department of Scales (R. 1827). He was normally not responsible, however, for day-to-day police operations, including those during the Alabama State College episode referred to in the advertisement, these being under the supervision of Montgomery's Chief of Police (R. 1844).

To establish the allegedly libelous effect of the advertisement upon respondent, six witnesses and respondent himself were permitted over objection to announce their views that the allegedly libelous statements would tend to be associated with the City Government, with the Commissioners generally, and with respondent "a little more", or with respondent more specifically and particularly (R. 1722, 1724, 1728, 1736, 1755-6, 1759, 1766-7, 1771, 1785, 1837). Three of these witnesses had first seen the advertisement when they were called to the office of respondent's counsel and shown it in order to equip them as witnesses (R. 1738-40, 1757, 1763-4, 1768-9).* The six witnesses said that *if* they had believed the statements about the police in the advertisements, they would have thought less of respondent, would have considered that the police had been guilty of serious misbehavior and would have thought respondent was carrying out the duties of his office incompetently and improperly (R. 1725, 1736-7, 1743, 1756, 1766, 1771, 1786-7). However, none of the witnesses testified that he believed the advertisement; five specifically testified that they dis-

* It may be noted here that approximately 394 copies of the issue of *The Times* containing the advertisement in question were circulated in the State of Alabama; of these, approximately 35 were distributed in Montgomery County (R. 1720).

believed it; and none was actually led to think less kindly of respondent because of it (R. 1743, 1745-6, 1757-9, 1764, 1768, 1772, 1789).

3. **The demand for a retraction.**—On April 8, 1960, respondent wrote to petitioner and to the four individual defendants demanding a retraction of the statements in the advertisement which are the basis for the libel action (R. 1706-7). On April 15, 1960, counsel for petitioner replied, saying they were "puzzled as to how" respondent considered the disputed statements to reflect upon him, assuring him that the assertions in the advertisement were still being checked, and suggesting that respondent might explain further to them how these assertions were deemed reflections upon him (R. 1708). Respondent made no further reply, but filed this suit, recovering the full $500,000 demanded by the complaint.

4. **The rulings below on the merits.**—As previously noted (p. 3), petitioner contended throughout that the facts alleged and proved could not support a judgment in respondent's favor for libel consistently with the freedom of the press guaranteed by the First Amendment as made applicable to the States by the Fourteenth Amendment. Specifically, petitioner contended that the constitutional safeguard was infringed by holding the publication libelous and actionable without proof of special damage, by permitting and sustaining a finding that the statements were "of and pertaining to" respondent and in sustaining the award of damages embodied in the verdict (R. 58-9, 2012, 2048-9, 2050). Rejecting these claims at every stage, the trial court charged that the portions of the advertisement in issue were "libelous *per se*", that "[g]eneral damages need not be alleged or proved but are presumed", that

respondent was entitled to recover both such "presumed" and punitive damages if the jury decided that the words related to and concerned him and that the damages awarded were not excessive (R. 86, 1951-4, 2057D).

In its opinion affirming the judgment, the court below agreed with these rulings. It held that where "the words published tend to injure a person libeled by them in his reputation, profession, trade or business, or charge him with an indictable offense, or tends to bring the individual into public contempt," they are "libelous *per se*"; and that the "matter complained of is, under the above doctrine, libelous *per se*, if it was published of and concerning the plaintiff". Appendix B, *infra*, p. 53. It held, further, that since it is "common knowledge" that a city's "governing body" controls such groups as police and firemen, and since "praise or criticism [of such employees] is usually attached to the official in complete control of the body", the trial court had correctly sustained the complaint as alleging a libel "of and concerning" respondent and the verdict so finding in his favor (*id.*, pp. 55-56, 59, 77). It also rejected petitioner's arguments under the First and Fourteenth Amendments (assignments of error 289-291, 296, 298, 306-308, 310), holding that (a) these were answered by the libelous character of the advertisement and that (b) in any event, the "Fourteenth Amendment is directed against State action and not private action." *Id.*, pp. 58-59.

5. **The jurisdiction of the Circuit Court**—Petitioner is a New York corporation which has not qualified to do business in Alabama or designated anyone to accept service of process there. It has no office, property or employees resident in Alabama (R. 435-6). Its staff correspondents do, however, visit the State as the occasion may arise for purposes of newsgathering. In the years 1956 through

April 1960, nine correspondents made such visits, totaling, in the view of the courts below, 153 days.* In the first five months of 1960 there were three such visits, two by Claude Sitton, the staff correspondent stationed in Atlanta, and one by Harrison Salisbury (R. 117). *The Times* also had an arrangement with newspapermen employed by Alabama journals to act as "stringers", paying them for stories they sent in that were accepted at the rate of a cent a word. The effort was to have three such stringers in the State, including one in Montgomery (R. 122, 300) but only two sold stories to *The Times* in 1960, Chadwick of South Magazine, who was paid $155 to July 26, and McKee of the Montgomery Advertiser, who was paid $90 for dispatches in that time (R. 111, 112, 297-303, 438). McKee also was asked to investigate the facts relating to respondent's claim of libel, which he did (R. 180, 698).

The advertisement complained of in this action was prepared, submitted and accepted in New York, where the newspaper is published (R. 384-386, 434). The national daily circulation of *The Times* was 650,000, of which the total sent to Alabama was 394. The Sunday circulation of *The Times* was 1,300,000, of which the Alabama shipments totaled 2,440 (R. 396-7). These papers were either mailed to subscribers or shipped prepaid by rail or air to Alabama news-dealers, whose orders were unsolicited (R. 399, 402-3, 441). *The Times* would credit these dealers for papers which were unsold or which arrived late, damaged or incom-

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* The finding that "correspondents of The Times spent 153 days in Alabama" during these years (Appendix B, *infra*, pp. 38, 84) must be based, we believe, on the petitioner's records of the correspondents' expense accounts, which were introduced in evidence and covered 115 days (R. 753-779) and on 50 published stories by such correspondents having Alabama date-lines, which were separately offered in evidence (R. 783-1025). If so, we think it plain that the two sets of figures involve a duplication as to dates and that the total number of days is 115, not 153. See also R. 303-310.

plete, the latter being certified by a local baggage man upon a form provided by *The Times* (R. 403, 406). Gross revenue from this Alabama circulation was approximately $20,000 in the first five months of 1960 of a total circulation revenue of $8,500,000 (R. 442).

The Times accepted advertising from Alabama sources, principally advertising agencies which sent their copy to New York, where any contract for its publication was made (R. 336-8, 344-6). The New York Times Sales, Inc., a subsidiary corporation, also solicited advertisements in Alabama, though it has no office or resident employees in the State. Four employees spent a total of 26 days in Alabama for this purpose in 1959 and one spent one day there before the end of May in 1960 (R. 330). Alabama advertising linage, including that volunteered and solicited, amounted to 5,471 in 1959 of a total of 60,000,000 published (R. 334, 336); it amounted to 13,254 through May of 1960 (R. 334) of a total of 20,000,000 lines (R. 335). Revenue from an Alabama supplement published in 1958 was $26,801.64 (R. 374). For the first five months of 1960 gross revenue from Alabama advertising was $17,000 to $18,000 of a total advertising revenue of $37,500,000 (R. 440). Gross revenue from Alabama advertising and circulation during this period was $37,300 of a national total of $46,000,000 (R. 443).

On these facts, the courts below held that petitioner was subject to the jurisdiction of the Circuit Court in this action, sustaining both the service of process on McKee as a purported agent and the substituted service on the Secretary of State, against objections based on the territorial limitations of due process, the Commerce Clause and the constitutional protection of the freedom of the press (R. 33, 39, 350, Appendix B, *infra*, pp. 37-49, 82-88). They also held that though petitioner had raised these questions by

motion to quash, appearing specially for that purpose as permitted by the Alabama practice, the fact that the prayer for relief asked for dismissal for "lack of jurisdiction of the subject matter" of the action, as well as want of jurisdiction of the person of defendant, constituted a general appearance and submission to the jurisdiction of the Court (R. 41-42, Appendix B, *infra*, pp. 49-52, 80-82).

REASONS FOR GRANTING THE WRIT

I

The decision of the Supreme Court of Alabama gives a scope and application to the law of libel so restrictive of the right to protest and to criticize official conduct that it abridges the freedom of the press, as that freedom has been defined by the decisions of this Court. It transforms the action for defamation from a method of protecting private reputation to a device for insulating government against attack. If the judgment stands, its impact will be grave—not only upon the press but also upon those whose welfare may depend on the ability and willingness of publications to give voice to grievances against the agencies of governmental power. The issues are momentous and call urgently for the consideration and determination of this Court.

First: The doctrine espoused by the court below is that a public official is entitled to recover "presumed" and punitive damages for a publication critical of the official conduct of a governmental agency under his general supervision, if that publication tends to "injure" him "in his reputation" or to "bring" him "into public contempt" as an official—unless a jury is persuaded that it is entirely true.

This principle of liability, resting as it does on a "common law concept of the most general and undefined nature" (*Cantwell* v. *Connecticut*, 310 U. S. 296, 308), is indis-

tinguishable in its function and effect from the proscription of seditious libel, which the verdict of history has long deemed inconsistent with the First Amendment. See Holmes, J. in *Abrams* v. *United States*, 250 U. S. 616, 630; Chafee, *Free Speech in the United States* (1941), pp. 27-29. In place of fine and imprisonment as the repressive sanction, damages are authorized "not alone to punish the wrongdoer, but as a deterrent to others similarly minded" and the damages are fettered by "no legal measure" of amount (Appendix B, *infra*, pp. 74, 76). Such damages are no less apt than criminal conviction to stifle that "free political discussion" which this Court has deemed "the security of the Republic, the very foundation of constitutional government" (*De Jonge* v. *Oregon*, 299 U. S. 353, 365).

There are, indeed, respects in which the private action brought by the aggrieved official may be more repressive than a prosecution for seditious libel. There is no requirement of an indictment and the case need not be proved beyond a reasonable doubt. It need not be shown, as the Sedition Act required, that the defendant's purpose was to bring the official "into contempt or disrepute" (Act of July 14, 1798, 1 Stat. 596); a statement adjudged libelous *per se* is *presumed* to be "false and malicious", as the trial court instructed here (R. 1952). Nor is it necessary, on the other hand, that there be proof of injury in fact to the official's reputation. It is enough that *if* the criticism were believed, it would "tend" to diminish his repute with members of the public (Appendix B, *infra*, pp. 61, 53).

We submit that such a rule of liability can not be reconciled with this Court's rulings on the scope of freedom of the press safeguarded by the Constitution. Those rulings start with the assumption that one of the prime objectives of the First Amendment is to protect the right to criticize

"all public institutions" (*Bridges* v. *California*, 314 U. S. 252, 270). As Mr. Justice Roberts said in *Cantwell* v. *Connecticut*, 310 U. S. 296, 310:

> "In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his point of view, the pleader, as we know, at times resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of citizens of a democracy."

Thus concern for the dignity and reputation of the bench does not sustain the punishment as a contempt of criticism of the judge or his decision (*Bridges* v. *California*, *supra*, at 270), though the utterance contains "half-truths" and "misinformation" (*Pennekamp* v. *Florida*, 328 U. S. 331, 342, 345); there must be clear and present danger of perversion of the course of justice. See also *Craig* v. *Harney*, 331 U. S. 367, 370, 374-375; *Wood* v. *Georgia*, 370 U. S. 375. We do not see how comparable criticism of an elected, political official may consistently be punished as a libel on the ground that it diminishes his reputation. The supposition that judges are "men of fortitude, able to thrive in a hardy climate" (*Craig* v. *Harney*, *supra*, at 376) must extend to commissioners as well.

The court below thought this submission answered by the proposition that the "Constitution does not protect libelous publications", relying on statements to that effect made in opinions of this Court. See *Konigsberg* v. *State Bar of California*, 366 U. S. 36, 49; *Times Film Corporation*

v. *City of Chicago*, 365 U. S. 43, 48; *Roth* v. *United States*, 354 U. S. 476, 486; *Beauharnais* v. *Illinois*, 343 U. S. 250, 266; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572; *Near* v. *Minnesota*, 283 U. S. 697, 715. The reliance surely is misplaced. Except for *Beauharnais*, the statements merely affirmed that the freedom of speech and press is not an absolute; they did not signify advance approval of whatever standards state courts might employ in the repression of expression as a libel. And *Beauharnais*, while it sustained conviction for a statement deemed to constitute a libel of a racial group, found by the state court to be "liable to cause violence and disorder," took pains to reserve this Court's "authority to nullify action which encroaches on freedom of utterance under the guise of punishing libel", adding that "discussion cannot be denied and the right, as well as the duty, of criticism must not be stifled." 343 U. S. at 264.

Hence libel, like obscenity, contempt, advocacy of violence, disorderly conduct or any other possibly defensible basis for suppressing speech or publication, must be defined and judged by standards which are not repugnant to the Constitution. The criterion employed below does not survive that test because it stifles criticism of official conduct no less potently than did seditious libel. If there is room for the protection of official reputation against criticism of official conduct, despite the fact that "public men are, as it were, public property" (*Beauharnais* v. *Illinois*, *supra*, at 263, note 18), measures less destructive of the freedom of expression are available and adequate to serve that end. See Edgerton, J. in *Sweeney* v. *Patterson*, 128 F. 2d 457, 458-9 (D. C. Cir. 1942), *cert. denied*, 317 U. S. 678 (1942). *Cf. Shelton* v. *Tucker*, 364 U. S. 479, 488; *Smith* v. *California*, 361 U. S. 147, 155; *Dean Milk* v. *City of Madison*, 340 U. S. 349.

Twenty-one years ago this Court embraced the opportunity to review a decision of the Court of Appeals for the Second Circuit which sustained, Judge Clark dissenting, the sufficiency of a complaint alleging libel in a syndicated column charging a Congressman by name with anti-Semitism in opposing an appointment. *Sweeney* v. *Schenectady Union Publishing Co.* 122 F. 2d 288. One of the questions presented was whether the ruling involved an abridgment of the freedom of the press. An equal division in this Court led to affirmance of the judgment. 316 U. S. 642. The considerations which favored review in *Sweeney* are, in our submission, more compellingly presented here.

Second: Assuming *arguendo* that the freedom of the press may constitutionally be subordinated to protection of official reputation, as it would be by the rule of law declared below, we contend that the rule as applied to the facts of this case infringes the federal rights of the petitioner. For nothing in the evidence establishes the type of injury or threat to the respondent's reputation that might provide an interest to which First Amendment freedom may be made to yield. *Cf. Konigsberg* v. *State Bar*, 366 U. S. 36, 50, n. 11.

The publication did not name respondent or the Commission of which he is a member and plainly was not meant as an attack on him or any other individual. Its protests and its targets were impersonal: "the police", the "state authorities", "the Southern violators". Neither respondent's passion to perceive in these collective generalities allusion to his personal identity nor the opinions of his witnesses provided evidence sufficient to sustain a finding that the statements were made "of and concerning" him. Moreover, statements which were accurate according to respondent's evidence surely cannot be relied on to establish injury to his official or his private reputation. It is,

therefore, significant to note how far the undisputed evidence showed that the statements made were false, an exercise the court below cannot have deemed material, since it is not attempted in the court's opinion.

We have summarized the evidence above (pp. 3-8) and we shall not repeat it *in extenso* here. It will suffice to say that if the reference to "the police" can validly be taken to refer to the respondent as Commissioner with jurisdiction over that department, as he and his witnesses testified and the court and jury found, the whole libel rests on two discrepancies between the statements and the facts. Where the advertisement said that "truckloads" of armed police "ringed the Alabama State College Campus", the fact was that only "large numbers" of police "were deployed near the campus" on three occasions, without ringing it on any. And where the advertisement said "They have arrested him [Dr. King] seven times"; the fact was that he had been arrested only four times. Three of the arrests had occurred, moreover, before the respondent came to office some six months before the suit was filed.

That the exaggerations or inaccuracies in these statements cannot rationally be regarded as tending to injure the respondent's reputation is, we submit, entirely clear.

None of the other statements in the paragraphs relied on by respondent even makes a colorable case. The advertisement was wrong in saying that the college dining hall was "padlocked" but, as the respondent testified (R. 1840), it was the State Education Department, with which he has no connection, that had jurisdiction of this matter, not the City Commissioners or the police. The "Southern violators", said to "have answered Dr. King's peaceful protests with intimidation and violence", were not even read by the respondent to include a reference to him (R. 1849-50). No

more so does the statement that "they" bombed his home, assaulted him and charged him with perjury point to the respondent as the antecedent of the pronoun. And while there was disputed evidence respecting a police assault before respondent was elected a Commissioner (R. 1713, 1816, 1817), there was beyond dispute a bombing of King's home and he was charged with perjury. Indeed, to raise funds to defend him on that charge was the main purpose of the publication.

Since the state court's denial of the claim that the publication was protected by the Constitution turned on the determination that it was defamatory as to the respondent, its finding on that issue must pass muster in this Court. There must be a sufficient basis in the evidence for the conclusion that the statements contained falsehood injurious to the respondent's reputation and the nature of the injury must justify the challenged limitation of expression. *Cf. Bridges* v. *California*, 314 U. S. 252, 263, 271. In passing on these questions this Court's duty is not only to assure that constitutional protections are respected in the standards by which judgment has been rendered but also "to analyze the facts in order that the appropriate enforcement of the federal right may be assured." *Norris* v. *Alabama*, 294 U. S. 587, 590. See also, *e.g.*, *Wood* v. *Georgia*, 370 U. S. 375, 386; *Craig* v. *Harney*, 331 U. S. 367, 373-4; *Pennekamp* v. *Florida*, 328 U. S. 331, 335; *Kingsley Pictures Corp.* v. *Regents*, 360 U. S. 684, 708 (concurring opinion); *cf. Thompson* v. *Louisville*, 362 U. S. 199; *Garner* v. *Louisiana*, 368 U. S. 157.

We submit that an appraisal of this record in these terms leaves no room for a determination that the publication sued on by respondent made a statement as to him, or that, if such a statement may be found by implication, it injured or jeopardized his reputation in a way that forfeits

constitutional protection, sanctioning its punitive repression by the judgment of the courts below.

Third: The magnitude of the punishment imposed on the petitioner gives emphasis to the importance of the questions posed by this and its companion cases in the courts of Alabama;* it also is, in our view, an independent reason why the judgment has abridged the freedom of the press.

As Mr. Justice Brandeis said, concurring in *Whitney* v. *California*, 274 U. S. 357, 377, a "police measure may be unconstitutional merely because the remedy, although effective as means of protection, is unduly harsh or oppressive". The proposition must apply with special force when the "harsh" remedy has been explicitly designed as a deterrent to expression. It is, indeed, the underlying basis of the principle that "the power to regulate must be so exercised as not, in attaining a permissible end, unduly

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* Libel actions based on the publication of the advertisement here involved, were also instituted by Governor Patterson of Alabama, Mayor James of Montgomery, Commissioner Parks and former Commissioner Sellers. The James case is pending on motion for new trial after a verdict of $500,000. The Patterson, Parks and Sellers cases, in which the damages demanded total $2,000,000, were removed by petitioner to the District Court but the Court of Appeals for the Fifth Circuit has held that they should be remanded. *Parks and Patterson* v. *New York Times Company*, 195 F. Supp. 919, rev'd, September 18, 1962. Another group of cases instituted by Birmingham officials, based on articles on racial tensions by Harrison Salisbury in *The Times*, were dismissed on jurisdictional grounds pursuant to the decision in *New York Times Company* v. *Connor*, 291 F. 2d 492 but the Court of Appeals reversed the judgment on November 16, 1962, bowing to the Alabama Supreme Court's interpretation of the jurisdictional statute in the instant case and reserving constitutional questions for decision "upon a full record after a trial on the merits." Alabama officials have also filed libel actions against the Columbia Broadcasting System based on television coverage of racial conflict in the State. *Morgan, Connor and Waggoner* v. *Columbia Broadcasting System, Inc.*, U.S. D.C. N.D. Ala. (So. Div.) Civil Actions No. 10067-S, 10068-S, 10069-S; *Willis and Penton* v. *Columbia Broadcasting System, Inc.*, U.S. D.C. M.D. Ala. (No. Div.) Civil Actions No. 1790-N, 1791-N (pending on removal).

to infringe the protected freedom." *Cantwell* v. *Connecticut*, 310 U. S. 296, 304, 308. See also, *e.g.*, *Grosjean* v. *American Press Co.*, 297 U. S. 233; *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449; *Speiser* v. *Randall*, 357 U. S. 513; *Smith* v. *California*, 361 U. S. 147; *Bates* v. *City of Little Rock*, 361 U. S. 516; *Shelton* v. *Tucker*, 364 U. S. 479.

We think this principle requires the reversal of this judgment as oppressive, even if it otherwise could be sustained. Viewing the publication as an offense to respondent's reputation, there was no rational relationship between the gravity of the offense and the size of the penalty imposed in his behalf. The court below declined, indeed, to weigh the elements of truth embodied in the publication, treating petitioner's assertion of belief in its substantial truth, so far as it might conceivably affect the respondent, as evidence of malice and support for the size of the award. Appendix B, *infra*, p. 77. No less important, any judgment of this magnitude, imposed routinely on these facts and sustained no less routinely on appeal, will necessarily have a repressive influence which extends far beyond preventing such inaccuracies of assertion as have been established here. This is not a time when it would serve the values enshrined in the Constitution to force the press to curtail its attention to the racial tensions of the country or to forego dissemination of its publications in the areas where tension is extreme. Here, too, the law of libel must confront and be subordinated to the Constitution. The occasion for that confrontation is at hand.

Fourth: The court below gave as a further reason for dismissing these constitutional contentions that "'[t]he Fourteenth Amendment is directed against State action and not private action'". Appendix B, *infra*, p. 59. This accepted proposition obviously has no application to this case. The petitioner has challenged a State rule of law applied by a

State court to render judgment carrying the full coercive power of the State, claiming full faith and credit through the Union solely on that ground. The rule and judgment are, of course, State action in the classic sense of the subject of the Amendment's limitations. See *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449, 463; *Barrows* v. *Jackson*, 346 U. S. 249, 253; *Shelley* v. *Kraemer*, 334 U. S. 1, 14.

II

In holding that the assumption of jurisdiction in this action by the Circuit Court, based on service of process on McKee and substituted service on the Secretary of State, did not transcend the territorial limits of due process, impose a forbidden burden upon interstate commerce or abridge the freedom of the press, the Supreme Court of Alabama has decided federal questions of substance which have not been and should be settled by this Court.

First: We note *in limine* that while the courts below considered and rejected the asserted federal objections to the jurisdiction, they also held that the petitioner had appeared generally in the action and submitted to the jurisdiction of the Court. This conclusion was based upon the ground that, while petitioner appeared specially in moving to quash the attempted service for want of jurisdiction of its person, as permitted by the Alabama practice, the prayer for relief concluded with a further request for dismissal for "lack of jurisdiction of the subject matter of said action." Such a prayer, the courts held, converted the special appearance into a general appearance by operation of the law of Alabama (R. 41-42; Appendix B, *infra*, pp. 49-52, 80-82).

The ruling lacks that "fair or substantial support" in prior Alabama holdings which alone suffices to defeat this

Court's review. *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449, 455-6. The basic principle was declared thirty years ago by the court below, in holding that a request for "further time to answer or demur or file other motions" did not constitute a general appearance waiving constitutional objections later made by a motion to quash. The question, it was said, is one "of consent or a voluntary submission to the jurisdiction of the court", an issue of "intent as evidenced by conduct", as to which "the intent and purpose of the context as a whole must control". *Ex parte Cullinan*, 224 Ala. 263, 266, 267. See also *Ex parte Haisten*, 227 Ala. 183, 187. Under this standard, it is plain that nothing in petitioner's motion disclosed an intent to invoke a ruling as to any matter other than petitioner's personal amenability to Alabama's jurisdiction in this action.

The teaching of *Ex parte Cullinan* has not been qualified by any other holding of the court below before the instant case. On the contrary, a motion to quash for inadequate service has been joined with a plea in abatement challenging the venue of the action without the suggestion that the plea amounted to a general appearance, though the question that it raised was characterized by the court below as whether "the circuit court of Talladega County had jurisdiction of the subject matter". *St. Mary's Oil Engine Co.* v. *Jackson Ice & Fuel Co.*, 224 Ala. 152, 157. Indeed, the precise equivalent of the prayer of the motion in this case was used in *Harrub* v. *Hy-Trous Corporation*, 249 Ala. 414, 416, and posed no obstacle to the adjudication of the issue as to jurisdiction of the person, raised on the special appearance. See also *Orange Crush Grapico Bottling Co.* v. *Seven-Up Company*, 128 F. Supp. 174 (N. D. Ala.) (on removal).

Against these indicia of Alabama law, ignored in the decisions of the courts below, the authorities that were

relied on are quite simply totally irrelevant. In *Blankenship* v. *Blankenship*, 263 Ala. 297, the court specifically declined to consider whether the appearance had been general or special, deeming the issue immaterial upon the question there involved. In *Thompson* v. *Wilson*, 224 Ala. 299, the defendant, a resident of Alabama, had not even purported to appear specially or attempted to question the court's jurisdiction of his person; his sole objection, taken by demurrer, was to the court's competence to deal with the subject matter of the action and to grant relief of the type asked. The California and North Carolina cases, cited and quoted below (*Olcese* v. *Justice's Court*, 156 Cal. 82; *Roberts* v. *Superior Court*, 30 Cal. App. 714; *Dailey Motor Co.* v. *Reaves*, 184 N. C. 260) and the similar decisions referred to in the annotation cited (25 A. L. R. 2d 838-842) all involved situations where the defendant's objection raised "the question whether considering the nature of the cause of action asserted and the relief prayed by plaintiff, the court had power to adjudicate concerning the subject matter of the class of cases to which plaintiff's claim belonged". *Davis* v. *O'Hara*, 266 U. S. 314, 318. That no such question was presented here the motion makes entirely clear.

For the foregoing reasons, we submit that the court's holding that petitioner made an involuntary general appearance does not constitute an adequate state ground, barring consideration of the question whether Alabama has transcended the due process limitations on the territorial extension of the process of her courts. *Cf. N. A. A. C. P.* v. *Alabama, supra; Staub* v. *City of Baxley*, 355 U. S. 313; *Davis* v. *Wechsler*, 263 U. S. 22; *Ward* v. *Love County*, 253 U. S. 17.

Moreover, even if petitioner could validly be taken to have made a general appearance, that appearance would not bar the claim that in assuming jurisdiction of this action

the state court has cast a burden upon interstate commerce forbidden by the Commerce Clause. That point is independent of the question of the defendant's amenability to process, as this Court has expressly held in ruling that the issue remains open, if presented on "a seasonable motion", notwithstanding presence of the corporation in the State or its appearance generally in the cause: *Davis* v. *Farmers Co-operative Co.*, 262 U. S. 312; *Michigan Central Railroad Company* v. *Mix*, 278 U. S. 492, 496. See also *Denver & R.G.W.R. Co.* v. *Terte*, 284 U. S. 284, 287 (attachment); *Canadian Pacific Ry. Co.* v. *Sullivan*, 126 F. 2d 433, 437 (1st Cir.), *cert. den.* 316 U. S. 696 (agent designated to accept service); *Zuber* v. *Pennsylvania R. Co.*, 82 F. Supp. 670, 674 (N. D. Ga). For the same reason, we submit, a general appearance would not bar the litigation of petitioner's contention that by taking jurisdiction in this action, the courts below denied due process by abridging freedom of the press; that also is an issue independent of the "presence" of petitioner before the Circuit Court.

Second: The decisions of this Court do not, in our view, support the power of the State to render judgment *in personam* based on the service of process in this cause. We recognize, of course, that there has been in recent years a relaxation in the limitations of due process on the territorial authority of the state courts. But neither what this Court in *Hanson* v. *Denckla*, 357 U. S. 235, 251 called the "flexible standard" of *International Shoe Co.* v. *Washington*, 326 U. S. 310, nor any of its later applications, sustains, in our submission, the determination here.

To begin, it is plain that the petitioner's peripheral relationship to Alabama does not involve "continuous corporate operations" which are "so substantial and of such

a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities". *International Shoe Co.* v. *Washington, supra,* at 318. The case bears no resemblance to *Perkins* v. *Benguet Consol. Mining Co.*, 342 U. S. 437, where the central base of operations of the corporation, including its top management, was in the state where suit was brought. Hence, if the jurisdiction is sustained, it must be on the ground that the liability asserted was so "connected with" petitioner's "activities within the state" as to "make it reasonable in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there." *International Shoe Co.* v. *Washington, supra,* at 319, 317.

No such connection has been shown. Here, as in *Hanson* v. *Denckla, supra,* at 252, the "suit cannot be said to be one to enforce an obligation that arose from a privilege the defendant exercised in" the State. The liability alleged by the respondent certainly does not arise from the activities of correspondents of *The Times* in covering the news in Alabama; and such reporting surely does not rest upon a privilege the State confers, but on a right, importing a high moral duty, conferred by the Constitution of the Nation. Nor is this liability connected with the occasional solicitation of advertisements in Alabama; the advertisement in suit was not solicited and did not reach *The Times* from anyone within the State. There remains, therefore, only the negligible circulation of *The Times* in Alabama to relate this action to the exercise by the petitioner of "the privilege of conducting activities within" the State. *International Shoe Co.* v. *Washington, supra,* at 319.

We contend that this circulation was not the exercise of such a privilege, since it was not effected by activity of

the petitioner *in* Alabama. Copies of the paper were mailed to subscribers from New York or shipped from there to dealers who were purchasers, not agents of *The Times*. On these facts there is, of course, a question whether Alabama, as a matter of the choice-of-law, may impose liability on the petitioner for causing or contributing to the dissemination of those papers in the State, treating it *pro tanto* as an Alabama "publication".* That question is, however, wholly different from the issue here presented: whether shipment of the papers from New York involved the exercise by the petitioner of any privilege to act in Alabama. *Hanson* v. *Denckla* (*supra*, at 253) is explicit that a State may justifiably apply its law to a transaction upon grounds quite insufficient to establish "personal jurisdiction over a non-resident defendant". See also *International Shoe Co.* v. *Washington*, *supra*, at 318. It "is essential" for such jurisdiction "that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson* v. *Denckla*, *supra*, at 253. Shipment in and from New York was not, in our submission, such an act. Nor was the judgment based, in any case, merely upon the 394 copies comprising the Alabama circulation of

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*Courts have been no less perplexed than commentators by the conflicts problems incident to multi-state dissemination of an alleged libel; and some have sought to solve them by a "single publication" rule, fixing the time and place of the entire publication when and where the first and primary dissemination has occurred. See, *e.g.*, *Hartman* v. *Time, Inc.*, 166 F. 2d 127 (3d Cir.), *cert. denied* 338 U. S. 858; *Insull* v. *New York World Tel. Corp.*, 273 F. 2d 166, 171 (7th Cir.), *cert. denied* 362 U. S. 942; *cf. Mattox* v. *News Syndicate Co.*, 176 F. 2d 897, 900, 904-05 (2d Cir.), *cert. denied* 334 U. S. 838. See also, *e.g.*, Prosser, *Interstate Publication*, 51 Mich. L. Rev. 959 (1953); Leflar, *The Single Publication Rule*, 25 Rocky Mt. L. Rev. 263 (1953); Note, 29 U. of Chi. L. Rev. 569 (1962).

The Times; the entire circulation of 650,000 was regarded as relevant to the verdict (R. 1720) and offered as a reason for sustaining the award. Appendix B, *infra*, pp. 75, 77.

In rejecting these arguments against the jurisdiction, the court below relied especially on the decision in *McGee* v. *International Life Ins. Co.*, 355 U. S. 220, where suit on an insurance contract was sustained in California against a non-resident insurer, based on the solicitation and the consummation of the contract in the State by mail. The contract was, however, a continuing relationship between the insurer and the insured within the State and one which the states traditionally have considered to require special regulation. See *Hanson* v. *Denckla*, *supra*, at 252; *Travelers Health Assn.* v. *Virginia*, 339 U. S. 643. No such continuing relationship gives rise to the liability asserted here; and newspaper publication certainly is not exceptionally subject to state regulation.

Moreover, even if the shipment of *The Times* to Alabama is regarded as an act of the petitioner within that State, we do not think the jurisdiction here affirmed can be sustained. In *International Shoe* this Court made clear that the new standard there laid down was not "simply mechanical or quantitative" and that its application "must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure" (326 U. S. at 319). See also *Hanson* v. *Denckla*, *supra*, at 253. The opinion left no doubt that, as Judge Learned Hand had previously pointed out (*Hutchinson* v. *Chase & Gilbert*, 45 F. 2d 139, 141), an " 'estimate of the inconveniences' which would result to the corporation from a trial away from its 'home' or principal place of business is rele-

vant in this connection" (326 U. S. at 317). Measured by this standard, a principle which would require, in effect, that almost every newspaper defend a libel suit in almost any jurisdiction of the country, however trivial its circulation there may be, would not further the "fair and orderly administration of the laws". The special "inconvenience" of the foreign publisher in libel actions brought in a community with which its ties are tenuous need not be elaborated. It was perspicuously noted by the court below in a landmark decision more than forty years ago, confining venue to the county where the newspaper is "primarily published". *Age-Herald Publishing Co.* v. *Huddleston*, 207 Ala. 40, 45. This record surely makes the "inconvenience" clear.

A different question might be posed if it were shown that the petitioner had engaged in activities of substance in the forum state, designed to build its circulation there. *Cf.* Mr. Justice Black, dissenting in part in *Polizzi* v. *Cowles Magazines, Inc.*, 345 U. S. 663, 667, 670. That would, at least, involve a possible analogy to other situations where a foreign enterprise attempts the exploitation of the forum as a market and the cause of action is connected with such effort (*Hanson* v. *Denckla*, *supra*, at 251-2), though there are differences as well as similarities that must be weighed. It also would confine the possibilities of litigation to those areas in which the publisher has had the opportunity to build some local standing with the public. It is enough to say that such activities, effort and opportunity are not presented here.

A federated nation could not long endure unless the power of the States to exert jurisdiction over men and institutions not within their borders were subjected to

reciprocal restraints on each in the interest of all. *Cf.* Learned Hand, J. in *Kilpatrick* v. *Texas & P. Ry. Co.*, 166 F. 2d 788, 791-2 (2d Cir.). The need for those restraints is clear, since when state jurisdiction does obtain, the Constitution obligates all other states to give full faith and credit to the judgment rendered, including those which may provide the only forum where the judgment can in practice be enforced. Thus jurisdictional delineations must be based on grounds that command general assent throughout the Union; were they not, full faith and credit would become a burden that the system could not bear.

Whether these demands of our federalism have been met by this decision is, we submit, an issue of great importance which calls for the judgment of this Court.

Third: In forcing petitioner to its defense in Alabama on this cause, the courts below have cast a burden upon interstate commerce which the Commerce Clause forbids.

The reasons are no different from those previously stated in contending that the court's assumption of jurisdiction *in personam* worked a deprivation of due process. It takes no gift of prophecy to know that if minuscule state circulation of a paper published in another state suffices to establish jurisdiction of a suit for libel, threatening the type of judgment rendered here, such distribution interstate cannot continue. So, too, if the movement of correspondents inter-state provides a factor tending to sustain such jurisdiction, as the court below declared, a strong barrier to such movement has been erected. *Cf. Edwards* v. *California*, 314 U. S. 160. These, like other burdens upon commerce, must be carried only when there is fair basis for their imposition to protect a local interest that the State may validly prefer to guard. But if, as we have urged, it

was not "reasonable in the context of our federal system of government" to require that petitioner defend this suit in Alabama, it follows that fair basis for the burden upon commerce has not been established. That inter-state communication is a form of commerce is, of course, accepted (see, *e.g.*, *Fisher's Blend Station* v. *Tax Commission*, 297 U. S. 650, 654-5); and that state judicial jurisdiction may impose a forbidden burden also is entirely clear. See, *e.g.*, *Michigan Central Railroad Company* v. *Mix*, 278 U. S. 492; *Denver & R.G.W. R. Co.* v. *Terte*, 284 U. S. 284; *Erlanger Mills, Inc.*, v. *Cohoes Fibre Mills, Inc.*, 239 F. 2d 502 (4th Cir.).

Fourth: We have argued that the jurisdictional determination violates the Constitution, judged by standards that apply to enterprise in general under the constitutional provisions limiting state power in the interest of our federalism as a whole. Even if we are wrong in these submissions, we contend that the decision on this issue calls for re-examination and reversal because it abridges the protected freedom of the press.

That state action which otherwise would be defensible may contravene the First Amendment as embodied in the Fourteenth when it has "the collateral effect of inhibiting the freedom of expression", was expressly held in *Smith* v. *California*, 361 U. S. 147, 151. See also pp. 19-20, *supra*. Such collateral effect on what is published and distributed throughout the Nation is plainly presented here, as we have previously shown.

Fifth: The decision below on the jurisdictional issue is in clear conflict with that of the Supreme Court of North Carolina in *Putnam* v. *Triangle Publications, Inc.*, 245 N.C. 432. This, in itself, is a substantial reason for review.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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